UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, Plaintiff,	:	**ECF CASE**
- v.-	:	05 Civ. 3941 (JSR)
UNITED STATES DEPARTMENT OF DEFENSE, Defendant.	:	

DEFENDANT'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Associated Press v. United States Department of Defense Doc. 18

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Preliminary Statement

In its moving brief, DOD showed that redaction of the Identifying Information is authorized by Exemption 6 because it furthers significant privacy interests, and that disclosure would not serve any public interest cognizable under FOIA.[1] In response, AP argues for disclosure based on its contention that AP is entitled to know who the government is detaining at Guantanamo. AP requested, however, and DOD provided, not the identities of those being detained at Guantanamo, but the personal stories the detainees told the CSRTs to contest their classification as enemy combatants. Now, after receiving the detainees' personal stories contained in the CSRT transcripts and detainee written statements, AP seeks the names and other identifying information that go with those personal stories. United States Dep't of State v. Ray, 502 U.S. 164 (1991), directly precludes such disclosure. AP may not avoid Ray by attempting to recast its FOIA request as one that merely seeks the identities of those the government is detaining. Nor does analogizing the CSRTs to criminal trials advance AP's case for disclosure. While the public has a qualified First Amendment right to an open criminal trial, no such right applies to the CSRTs. Indeed, AP was allowed to attend the CSRTs only after it agreed to abide by ground rules that included a prohibition on disclosure of detainees' identities.

Disclosure of the identities of detainees who provided particular personal information to the CSRTs, furthermore, would not shed light on how DOD conducted the CSRTs. AP has not shown otherwise, but rather seeks disclosure for the stated purpose of using the detainees' identities as a step in investigating the correctness of the CSRTs' decisions. As explained in DOD's moving brief and further below, assisting AP in pursuing such a news story not a public interest FOIA protects, and cannot defeat the significant privacy interests that bar DOD from disclosing a detainee's identity in connection with the story he told the CSRT. Accordingly, summary judgment upholding DOD's redactions is warranted.

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[1] The abbreviations used in this memorandum follow those used in DOD's moving brief ("Mov. Br.").

ARGUMENT

DISCLOSURE OF THE IDENTIFYING INFORMATION WOULD CONSTITUTE A CLEARLY UNWARRANTED INVASION OF PRIVACY

A. The Identifying Information is Subject to Exemption 6

AP argues that the Identifying Information is not covered by Exemption 6 at all because it was presented to "a governmental tribunal" empowered to incarcerate detainees. AP Br. at 11. This argument contravenes United States Supreme Court precedent and should be rejected.

In United States Dep't of State v. Washington Post Co., 456 U.S. 595 (1982), the Supreme Court held that the statutory phrase "similar files" encompasses any "information which applies to a particular individual." Id. at 602; see also Mov. Br. at 13. AP grudgingly acknowledges as much, while attempting to discount the significance of this United States Supreme Court ruling by deeming it merely an example of "some courts'" recognition of this doctrine. AP Br. at 11. Thus, there is no dispute that Exemption 6 applies to information in government records that "applies to a particular individual." Washington Post, 456 U.S. at 602.

Nonetheless, AP suggests that this Court create an exception to the definition of "similar files" for information that "applies to a particular individual," id., but that is used by the government in deciding whether to incarcerate the individual. See Br. at 11-13. AP offers no support for carving out an "incarceration exception" to the rule of Washington Post, but cites instead two constitutional tort cases in which the government's interest in disclosure was held to outweigh a criminal suspect's privacy interest. See Br. at 12-13.[2] The question of whether a balancing of the private and public interests at issue ultimately favors disclosure or withholding, however, is conceptually distinct from whether the Identifying Information meets the threshold "similar files" requirement of Exemption 6. That question is not answered, as Washington Post makes clear, by examining the subject matter of the records, or by balancing the relevant privacy interests against the public interest in disclosure. Because there can be no serious dispute that the Identifying Information is information that "applies to a particular individual," it is subject to Exemption 6. Washington Post, 456 U.S. at 602.

B. Disclosure of the Identifying Information Implicates Significant Privacy Interests and Would Not Serve the Public's Interest in Understanding DOD's Conduct of the CSRTs

AP pins its case for disclosure on the contention that disclosure of personal information about detainees would be "useful" to understanding DOD's conduct of the CSRTs and "other aspects of DOD's conduct," in three respects. AP Br. at 13. None overcomes the privacy interests served by redaction of the Identifying Information.

1. Disclosure of the Identifying Information Would Link Particular Detainees to Their Personal Histories and Evidence They Gave the Tribunals

Analogizing the case of detained enemy fighters to criminal defendants, AP argues that the public has a right to know who is being detained at Guantanamo. See AP Br. at 14. AP's FOIA request, however, did not seek the identities of those detained at Guantanamo; it sought the evidence they gave the CSRTs to contest their classification as enemy combatants. Indeed, AP's brief makes apparent that it is not interested merely in names, but in being able to link a detainee to the personal story he told the Tribunal in order to investigate the facts of that story. Id. at 17, 19. Whatever the government's practice as to criminal defendants or captured Nazi saboteurs, see AP Br. at 15 n.9, disclosure of detainee names here would not simply reveal who the government is detaining, but would link each detainee to the personal information he gave the Tribunal in an effort to exonerate himself. United States Dep't of State v. Ray, 502 U.S. 164 (1991), and Department of the Air Force v. Rose, 425 U.S. 352 (1976), are directly on point and protect the significant privacy interests at stake in linking an individual to the personal details he provided to a government tribunal (Rose) or interviewer (Ray). See Mov. Br. at 17-18.

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[2] See Paul v. Davis, 424 U.S. 693, 712-13 (1976) (privacy interest in arrest); Caldarola v. County of Westchester, 343 F.3d 570, 575-76 (2d Cir. 2003) (privacy interest in being subjected to perp walk).

AP's arguments for distinguishing Ray – that the repatriated Haitian refugees were not being detained by the United States, and that the State Department conducted the interviews under a promise of confidentiality – are not persuasive. See AP Br. at 20. Exemption 6 protects privacy interests that are recognized by law, not merely by agreement of the government and the individual whose name is in its files. And AP's suggestion that the fact of an enemy combatant's detention gives rise to heightened public interest in linking his identity to his personal history finds no support in Ray, Rose, Reporters Committee, or any of the other FOIA cases cited in DOD's moving brief that govern the analysis here.

Analogizing a Guantanamo detainee to a criminal defendant is inapt in any event. The public nature of criminal proceedings rests on a qualified First Amendment right of public access to such proceedings and the accused's Sixth Amendment right to a public trial, see, e.g., Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 9 (1986), rights which have not been held to apply to the CSRT proceedings. Cf. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 935 ("We will not convert the First Amendment right of access to criminal judicial proceedings into a requirement that the government disclose information compiled during the exercise of a quintessential executive power – the investigation and prevention of terrorism."). Indeed, news organizations such as AP were allowed to attend the CSRTs only if they agreed to a set of ground rules that included agreeing not to "report[] or otherwise disclose in any way" detainees' identities. See Supplemental Declaration of Karen L. Hecker ("Hecker Supp. Decl."), dated July 25, 2005 ¶ 16 and Exh. 1.

Equally important, identifying the detainees who gave particular testimony to the CSRTs would not in itself shed any light on DOD's conduct of the CSRTs, and AP has not shown otherwise. See AP Br. at 14-16. Indeed, its example of the detainee with "obvious access to significant amounts of money" highlights the point. AP Br. at 18. AP wishes to learn this detainee's nationality to test its suspicion that he "may be a member of the royal family" – i.e., to piece his nationality together with other personal information in the transcript to figure out who this detainee is. Far from "shed[ding] light on the actions taken by DOD in this detainee's case," id., knowing whether a detainee is a member of some royal family does not reveal anything about the CSRT's handling of this detainee's case. It merely provides more information about this detainee. See Reporters Committee, 489 U.S. at 774 (if plaintiffs in Rose "had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in Rose would have been inapplicable").

2. Making AP's Investigation of the Factual Basis for CSRT Decisions More Convenient Is Not a Public Interest FOIA Protects

Next, AP argues that the Identifying Information should be disclosed because it would "allow AP to investigate and report on the validity of DOD's claims about specific detainees." AP Br. at 17. Providing assistance in news gathering, however, is not a public interest that FOIA protects.

In Reporters Committee, the Supreme Court held that whether an invasion of privacy is warranted "cannot turn on the purposes for which the request for information is made." Reporters Committee, 489 U.S. at 770. Thus, "the identity of the requesting party and the use that party plans to make of the requested information has no bearing on the assessment of the public interest served by disclosure." Massey v. FBI, 3 F.3d 620, 625 (2d Cir. 1993) (emphasis added); see also Reporters Committee, 489 U.S. at 771 ("the identity of the requesting party has no bearing on the merits of his or her FOIA request;""the rights of the two press respondents in this case are no different from those that might be asserted by any other third party"). Rather, the question is whether the disclosure itself would shed light on the government's conduct. See id.; Mov. Br. at 22-24.

Here, disclosure of information that would link particular detainees to the evidence they gave to the CSRTs would not in itself tell the public anything about the legitimacy of DOD's classification of them as enemy combatants. And the fact that AP will use the information to investigate the facts bearing on CSRT decisions – evidently through the detainees themselves and others identified in their testimony and statements – does not make disclosure appropriate. In addition to not being a public interest FOIA protects, see Mov. Br. at 22-25, the Supreme Court in Ray expressly held that a FOIA plaintiff's wish to use identifying information to contact the subject of the information weighs strongly against its disclosure:

> [W]e cannot overlook the fact that [plaintiffs] plan to make direct contact with the individual Haitian returnees identified in the reports. . . .[T]he intent to interview the returnees magnifies the importance of maintaining the confidentiality of their identities.

Ray, 502 U.S. at 549. While AP has every right to conduct its own investigation of the factual bases for the classification of particular detainees as enemy combatants, facilitating such an investigation is not a public interest that FOIA protects. See Mov. Br. at 23-25; cf. Center for Nat'l Sec. Studies, 331 F.3d at 935 (noting that, while there is no First Amendment right of access to prisons, "the press ha[s] ample means for obtaining information about prison conditions, 'albeit not as conveniently as they prefer'") (citation omitted). While it may take more effort, AP is free to pursue its investigation, for example, by contacting any of the 210 Guantanamo detainees who have filed habeas cases or their lawyers. See Hecker Decl. ¶ 9.[3]

3. The Identifying Information Does Not Shed Any Light on the Merit of Detainees' Allegations of Abuse

Finally, AP conclusorily asserts that disclosure of identifying information from the CSRT documents would help the press and the public evaluate allegations of abuse by detainees. AP Br. at 19. But knowing which detainee gave what evidence to the CSRTs would not illuminate the merit of the detainee's abuse allegations, for such allegations – and DOD's response to them – have nothing to do with the functioning of the CSRT process that is the subject of AP's FOIA request.

To perform the balancing required by Exemption 6, a court must identify the privacy interests at stake and the public interest that would be served by release of the information actually sought. Thus, in Ray, the Supreme Court identified the public interest in the State Department's interview summaries as "knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute" the Haitian returnees. Ray, 502 U.S. at 178. And in Rose, the

[3] AP's reliance on In Re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454 (D. D.C. 2005) – which held that the detainees possess certain due process rights – to argue that disclosure is warranted because DOD's classification decisions could be "mistaken" is misplaced. AP Br. at 17-18. That AP seeks to investigate supposed mistakes in CSRT decisions merely highlights AP's intention to use the Identifying Information to pursue a news story – not because the names, ages, and nationalities of detainees would themselves shed any light on the CSRTs' decisionmaking. In addition, Judge Green's questioning of the sufficiency of the unclassified evidence in the detainee's case highlighted by AP depended on both the Judge's acceptance of the truth of the detainee's allegations and her legal conclusion that the Guantanamo detainees possess certain due process rights, and thus are entitled to have their classification supported by a particular quantum of proof subject to determination by a federal judge – a proposition rejected by another judge of the same court in a different habeas action. See Khalid v. Bush, 335 F. Supp. 2d 311, 321 (D. D.C. 2005) ("non-resident aliens captured and detained [at Guantanamo] . . . have no viable constitutional basis to seek a writ of habeas corpus"). Both decisions are on appeal to the D.C. Circuit. See Docket Sheets for Nos. 02-CV-0299 (Judge Green) and 04-CV-1142 (Judge Leon), available at www.dcd.uscourts.gov.

public interest in summaries of Air Force Academy disciplinary hearings against cadets was to understand "the way the Air Force Academy administered its Honor Code." Reporters Committee, 489 U.S. at 773. In other words, to identify the public interest "that is to be taken into the balance, [the court] look[s] to the nature of the requested document and to the FOIA purpose to be served by its disclosure." Dunkelberger v. Department of Justice, 906 F.2d 779, 781 (D.C. Cir. 1990).

Here, the public interest in the records AP requested (and DOD produced) – transcripts of detainee testimony before the CSRTs, detainees' written statements to the CSRTs, and documents detainees gave their personal representatives – is to understand how DOD carried out its obligations in conducting the CSRT process, not to assess the merit of detainee abuse allegations, a subject that has nothing to do with the CSRT documents that were the subject of AP's FOIA request. See Dunkelberger, 906 F.2d at 781 (where public interest in documents requested by reporter was in knowing of "FBI agent's alleged participation to entrap a public official and in the manner the agent was disciplined," information unrelated to that not subject to disclosure under Exemption 7(C), "even if [it was] to reveal other kinds of misconduct"). Indeed, AP made a separate FOIA request for documents reflecting disciplinary actions taken as result of allegations of mistreatment by Guantanamo detainees – documents that would shed light on DOD's assessment of the merit of such allegations. DOD produced responsive documents on June 24, 2005 and July 22, 2005.

C. A Detainee-by-Detainee Review of the Identifying Information Is Unwarranted

In the alternative, AP argues that determination of whether disclosure of the Identifying Information would constitute a clearly unwarranted invasion of privacy should be made on a detainee-by-detainee basis, and that the detainees' ages and nationalities should be disclosed because such information is "newsworthy" and would not "by [itself]" identify a particular detainee. AP Br. at 22-23. Neither argument justifies the disclosure AP seeks.

First, AP misunderstands both the nature of the privacy interests at stake and what constitutes a public interest cognizable under FOIA. While an array of information about individuals who are the subject of government records may be newsworthy, that simply is not the standard for disclosure under Exemption 6. See Reporters Committee, 489 U.S. at 774 (history of individual's arrests and convictions "would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA"). In addition, AP did not simply request production of detainee ages and nationalities, information which, standing alone, might or might not be identifying; AP requested, and DOD produced, the personal stories the detainees presented to the CSRTs to contest their detention, and now seeks disclosure of the ages and nationalities of the detainees who presented those stories. Thus, it is irrelevant to the balancing analysis whether detainee ages and nationalities, "by themselves identify a particular detainee." AP Br. at 23. Finally, AP is wrong to characterize the only privacy interest at stake as the potential danger to detainees and their families. See AP Br. at 22. Ray recognizes a significant privacy interest in preventing the linking of a particular individual to personal information about him in the government's files. See 502 U.S. at 176. Indeed, the significance of the privacy intrusion depends on two factors, "the characteristic(s) revealed by virtue of being [identified], and the consequences likely to ensue." Id. at 177 n.12.

Nor does the case law support the need for a detainee-by-detainee evaluation to uphold DOD's Exemption 6 redactions.[4] In Ray and Rose, redaction of the identical kind of information

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[4] The footnote in Ray AP cites to support this argument, see AP Br. at 22-23, does not actually address categorical versus case-by-case withholding determinations, as the excerpt cited by AP makes apparent. Badhwar v. United States Dep't of the Air Force, 829 F.2d 182 (D.C. Cir. 1987), see AP Br. at 23, did not rule on the Exemption 6 claim asserted to justify withholding of a portion of an Air Force autopsy report, and also did not address categorical (continued...)

– "names and other identifying information," Ray, 502 U.S. at 169, and "personal references and other identifying information," Rose, 425 U.S. at 380 – was upheld without the State Department or Air Force being required to demonstrate that revealing identifying information in each interview summary or disciplinary hearing summary would constitute a clearly unwarranted invasion of privacy. See Ray, 502 U.S. 169 & n.5, 175-76; Rose, 425 U.S. at 380-81.[5]

CONCLUSION

For the foregoing reasons and those set forth in DOD's moving brief, the Court should grant DOD's motion for summary judgment, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 25, 2005

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[4](...continued)
versus case-by-case withholding. Its "case-by-case evaluation" comment relied on by AP merely emphasized the need to evaluate the autopsy report at issue, given that "some autopsy reports . . . would not be of a kind that would shock the sensibilities of surviving kin" while others would. Badhwar, 829 F.2d at 185-86.

[5] As to AP's complaint, in a footnote, about transcript exhibits missing from DOD's production, some of the exhibits AP identifies were in fact not responsive to its requests. See Hecker Supp. Decl. ¶¶ 2-7, submitted with this brief. In any event, in response to AP's concerns, DOD has undertaken a completely new review of the CSRT files and has provided any responsive documents that were inadvertently not produced earlier. See id. ¶¶ 8-15.